

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LUNA GAMING - SAN DIEGO LLC, a
Michigan Limited Liability Company,

Plaintiff,

vs.

DORSEY & WHITNEY, LLP, HOLLAND
& KNIGHT, LLP, BLEDSOE DOWNES &
ROSIER, P.C., PHILIP M. BAKER-
SHENK, AND BRADLEY GRANT
BLEDSOE DOWNES, jointly and
severally,

Defendant.

CASE NO. 06cv2804 BTM (WMC)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

In this case, Plaintiff Luna Gaming-San Diego, LLC ("Luna Gaming")¹ filed suit against various law firms and attorneys alleging causes of action for professional negligence, negligent misrepresentation, and breach of fiduciary duty. Defendant Bradley Grant Bledsoe Downes ("Downes"), an attorney formerly with the Dorsey & Whitney law firm, and his current firm, Defendant Bledsoe Downes & Rosier ("BDR") (together, "Defendants"), now move for summary judgment on these claims. Defendants argue that because they did not share an attorney-client relationship with Plaintiff, Plaintiff's professional negligence and breach of

¹ Luna Gaming originally went by the name "Action Gaming." Thomas Celani, the owner of Action Gaming, changed the entity's name to Luna Gaming-San Diego, LLC on June 29, 2001. Throughout this motion, the Court will refer to this gaming entity as Luna Gaming.

1 fiduciary duty claims necessarily must fail. Defendants further argue that Plaintiffs should
2 be estopped from claiming such an attorney-client relationship existed. Finally, Defendant
3 BDR claims that there is no causal link between its conduct and the damages alleged by
4 Plaintiff.

5 6 **I. FACTUAL BACKGROUND**

7 In its September 30, 2008 Order granting in part and denying in part Defendants
8 Dorsey & Whitney ("Dorsey"), Holland & Knight ("Holland"), and Philip Baker-Shenk's
9 ("Baker-Shenk") motions for summary judgment [Docket No. 79], the Court described the
10 factual background of this case in detail. The Court incorporates that factual background
11 here. The Court only elaborates on facts newly introduced as part of the instant motion and
12 those which relate specifically to Downes or BDR.

13 Dorsey employed Downes, in different capacities, from August, 1999 to January,
14 2006. (PNOL, Ex. 32 p.14:17–15:6.) Although Downes was a Dorsey contract attorney at
15 the time, he was not involved in the preparation and execution of the "Project Agreements"
16 between the Tribe and Luna Gaming. (DUF 8; DNOL, Ex. 12 p. 178:16–179:8.) Downes
17 subsequently devoted approximately one-third of his time to the Project while practicing at
18 Dorsey. (PNOL, Ex. 32 518:12–14.) Downes formed BDR with Philip Rosier in January,
19 2006. (Downes Decl. ¶ 5.) Downes continued, however, to send communications to the
20 Tribe on Dorsey letterhead throughout 2006 and into 2007. (PNOL, Ex. 38 p. 573–593.)
21 After the firm's formation, BDR also represented the Tribe in connection with the Project.
22 (Downes Decl. ¶¶ 6–7.) BDR entered into a written retainer agreement with the Tribe and
23 Downes served as the primary billing partner on the representation. (Id.) Plaintiff does not
24 dispute that it never executed a written retainer or engagement letter with BDR. (DUF 54.)
25 In accordance with the Project Agreements, however, Plaintiff paid for the work on the
26 Project that BDR performed for the Tribe. (Downes Decl. ¶ 7.)

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II. DISCUSSION

Federal Rule of Civil Procedure 56 provides that a party may move for summary judgment when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. A "genuine issue" is one where, based on the evidence presented, a fair minded jury could return a verdict in favor of the nonmoving party on the issue in question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In considering a motion for summary judgment, the Court must examine all of the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Defendants Downes and BDR ("Defendants") request summary judgment on Plaintiff's claims for professional negligence, negligent misrepresentation, and breach of fiduciary duty on three grounds. First, Defendants argue that because Plaintiff cannot establish the existence of an attorney-client relationship with Downes or BDR, they owed no duty to Plaintiff and its claims must fail. Second, Defendants argue that Plaintiff should be estopped from claiming that an attorney-client relationship existed with Downes or BDR because of representations and omissions that Plaintiff made to third parties indicating that Defendants represented solely the Tribe. Third, Defendants argue that there is no causal link between Plaintiff's claim for damages and BDR's conduct, since it did not come into existence until after the alleged misconduct took place.

A. Downes Did Not Represent Plaintiff Prior to the Project Agreements

In its earlier Order on Defendants Dorsey, Holland, and Baker-Shenk's motions for summary judgment, the Court analyzed separately whether an attorney-client relationship existed prior to the Project Agreements and after their execution. The same bifurcation of analysis is appropriate here. The Court concludes that Plaintiff has failed to raise a triable issue of fact as to whether Downes represented it before the Project Agreements were executed.

The Court already granted summary judgment in favor of Dorsey on Plaintiff's claims

1 for professional negligence and breach of fiduciary duty to the extent that they were based
 2 on events prior to the execution of the Project Agreements on March 29, 2000.² Plaintiff also
 3 does not dispute that Downes, a contract attorney for Dorsey at the time, was not involved
 4 in any of the discussions, negotiations, or preparation preceding the Agreements. (PUF 52.)
 5 Therefore, Downes engaged in no contact at all which would suggest that an attorney-client
 6 relationship existed with Plaintiff prior to the Project Agreements' execution on March 29,
 7 2000. Because the Court finds that no attorney-client relationship existed between Downes
 8 and Plaintiff before the Project Agreements were executed, the Court **GRANTS** partial
 9 summary judgment in favor of Downes on Plaintiff's claims for professional negligence and
 10 breach of fiduciary duty to the extent that they are based on events before March 29, 2000.

11 Unlike Dorsey itself, since Downes had no contact at all with Plaintiff preceding the
 12 execution of the Project Agreements, he did not make any statements during that time period
 13 out of which Plaintiff's negligent misrepresentation claim could arise. The Court concludes
 14 that no triable issue of fact exists regarding Plaintiff's negligent misrepresentation claim
 15 against Downes to the extent that it is based on events prior to the Project Agreements'
 16 execution. Thus, the Court **GRANTS** partial summary judgment in favor of Downes on
 17 Plaintiff's negligent misrepresentation claim to the extent that it is based on events occurring
 18 before March 29, 2000.

19 20 B. Downes's Representation of Plaintiff Project While Employed at Dorsey

21 As set forth above, the Court finds that there is no genuine issue of material fact
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23 ² In its opposition to Defendants' Motion for Summary Judgment, Plaintiff argues that
 24 new evidence turned over by Dorsey suggests that an attorney-client relationship did in fact
 25 exist between itself and the firm prior to March 29, 2000. (Pl. Res. to Def. MSJ 13.) The
 26 Court did not have this evidence to consider, however, when it ruled on Dorsey's motion for
 27 summary judgment on September 30, 2008. Even if the Court were to reconsider its earlier
 28 order, partial summary judgment in favor of Downes would remain appropriate here. Plaintiff
 agrees that Downes did no work related to formation of the Project Agreements. (PUF 52.)
 Generally, an innocent agent will not be held liable for his principal's tort. B.E. Witkin,
Agency and Employment, 3 Wit. Sum. § 201 (10th ed. 2005); see also Mars v. Wedbush
Morgan Securities, Inc., 231 Cal. App. 3d 1608, 1616 (1991). Thus, because Downes was
 merely a Dorsey contract attorney at the time and uninvolved with any work preparing the
 Project Agreements, he cannot be held liable for events prior to March 29, 2000.

1 regarding whether Downes represented Plaintiff before the parties executed the Project
2 Agreements. Plaintiff has raised an issue of fact, however, as to whether Downes
3 represented it after execution of the Project Agreements.

4 An attorney-client relationship may be created by express or implied contract. Fox v.
5 Pollack, 181 Cal. App. 3d 954, 959 (1986). Where a party claims a disputed contract was
6 implied, the existence of the attorney-client relationship is a question of law resolved through
7 an objective test. Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652
8 (N.D. Cal. 1993). Courts focus on whether it would have been reasonable, taking into
9 account all of the relevant circumstances, for the person claiming the attorney-client
10 relationship existed to have believed that she was in fact a “client” of the lawyer. Id. at 651.
11 In assessing the reasonableness of a party’s belief, courts consider many factors, including
12 (1) the conduct of the party and counsel, (2) whether the party paid or was obligated to pay
13 counsel for his services, (3) the relative sophistication of the party, (4) the magnitude of the
14 interests involved, and (5) whether the party consulted or had access to other lawyers during
15 the time period in question. Id. at 652.

16 Courts consider additional factors when a party claims that it was jointly represented
17 along with an attorney’s undisputed client. In the joint representation context, courts evaluate
18 carefully the relationship between the two allegedly represented parties, analyzing such
19 factors as: (1) the conduct of the parties towards one another, (2) the terms of any
20 contractual relationship between the two parties, (3) whether and to what extent there was
21 separate and private communication between the attorney and either of the allegedly
22 represented parties, (4) the extent of common interests between the allegedly jointly
23 represented parties, and (5) the extent to which either party communicated privately with
24 other lawyers. Sky Valley, 150 F.R.D. at 652–653. Mere dispensing of legal advice is not
25 sufficient to create an attorney-client relationship where a party claims joint representation.
26 Id. at 651.

27 The Court noted in its previous order denying summary judgment as to Defendant
28 Dorsey that the cooperative nature of the Project and the requisite sharing of legal and

1 confidential information between Plaintiff and the Tribe's lawyers would not necessarily
2 establish an attorney-client relationship. Nevertheless, the Court concludes here that a
3 material issue of fact exists as to whether Plaintiff reasonably believed that Downes
4 represented it jointly with the Tribe following the execution of the Project Agreements.

5 First, Downes, like other Dorsey attorneys, provided legal advice that Plaintiff's
6 evidence may establish was specifically for its own benefit and not required or envisioned by
7 the Project Agreements. For example, it appears Downes: (1) assisted Plaintiff in obtaining
8 licenses (PNOL, Ex. 4 p. 86, 101, 104, 108); (2) advised Plaintiff on its business plan (PNOL,
9 Ex. 4 p. 109); (3) provided Plaintiff with resources regarding legal constraints on political
10 contributions (PNOL, Ex. 4 p. 81); and (4) aided Plaintiff in contacting potential financial
11 partners for the Project (PNOL, Ex. 15 p. 273).

12 Second, Downes specifically recommended in an email that Dorsey attorneys and
13 Plaintiff discuss legislation potentially affecting the Project "in a protected attorney-client
14 manner before any further action [was] taken." (PNOL, Ex. 24 p.486.) Downes also
15 communicated confidentially with Plaintiff, separately from the Tribe, when he attended the
16 Las Vegas meeting at which Plaintiff and Dorsey attorneys discussed political lobbying efforts
17 and a potential financial partner for Plaintiff. (PNOL, Ex. 3 p. 59–63.) Downes himself
18 appears to have been responsible for relaying decisions made by Dorsey and Plaintiff
19 together at this meeting later to the Tribe. (PNOL, Ex. 3 p. 63:16–21.) Based on these
20 communications, a jury could find that it was reasonable for Plaintiff to believe it was a client
21 of Downes.

22 The Court thus concludes that a triable issue of fact exists as to whether Downes and
23 Plaintiff had an attorney-client relationship after execution of the Project Agreements on
24 March 29, 2000 and during his employment with Dorsey.

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26 C. Equitable Estoppel

27 Defendants' alternative argument, that Plaintiff should be estopped from claiming an
28 attorney-client relationship existed between the parties, is unpersuasive. The doctrine of

1 equitable estoppel “provides that a person may not deny the existence of a state of facts if
2 he intentionally led another to believe a particular circumstance to be true and to rely upon
3 such belief to his detriment.” Strong v. County of Santa Cruz, 15 Cal. 3d 720, 725 (1975).
4 Four elements must be satisfied for equitable estoppel to apply: (1) the party to be estopped
5 must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or
6 must so act that the party asserting the estoppel has a right to believe it was so intended; (3)
7 the party claiming estoppel must be ignorant of the true state of facts; and (4) he must rely
8 upon the conduct to his injury. Id.

9 Defendants base their estoppel argument on several representations to third parties.
10 First, Defendants rely upon provisions of the Project Agreements, which were submitted to
11 the National Indian Gaming Commission (“NIGC”) for approval by the Chairman. These
12 provisions indicated that the parties were not joint venturers of one another and promised
13 compliance with the Indian Gaming Regulatory Act of 1988 (“IGRA”). Defendants correctly
14 note that the Agreements claimed that the parties were not engaged in a joint venture.
15 (DNOL, Ex. 23 ¶ 9.4.) Downes has not shown, however, that he was ignorant of the true
16 state of facts, namely, that he represented Plaintiff jointly with the Tribe. Rather, his conduct
17 as elaborated above demonstrates that a triable issue of fact exists as to whether Downes
18 actually jointly represented Plaintiff despite the language of the Agreements.

19 The provision of the Project Agreements promising compliance with the IGRA likewise
20 fails as a basis for Defendants’ equitable estoppel defense. Defendants point to no provision
21 of the IGRA specifically prohibiting joint representation of tribes and management
22 contractors. Reliance by a party claiming estoppel must have been reasonable under the
23 circumstances. Mills v. Forestex Co., 108 Cal. App. 4th 625, 655 (2003). Here, it was not
24 reasonable for Downes to rely on a general promise by Plaintiff to comply with the IGRA as
25 proof that he did not jointly represent the Tribe and Plaintiff. Thus, Plaintiff is not estopped
26 from claiming representation by Downes merely on the basis of statements to the NIGC in
27 the Project Agreements.

28 Second, Downes asserts estoppel based on the response Dorsey submitted to the

1 NIGC's October, 2002 request for additional information to assist in the approval process for
2 the Project Agreements. This response, submitted by Downes, separately listed attorneys
3 for the Tribe and Plaintiff, with Dorsey & Whitney clearly identified as counsel for the Tribe
4 but not Plaintiff. (DNOL, Ex. 59 p. 348.) Plaintiff, through its general counsel Jim Oegema,
5 agreed that the response was accurate, though it never made any representations regarding
6 counsel for the two parties directly to the NIGC itself. (DNOL, Ex. 59 p. 338–341.) Again,
7 Downes was aware of his own conduct regardless of these representations to the NIGC.
8 Because a triable issue of fact exists as to whether Downes actually represented Plaintiff,
9 Plaintiff should not be estopped from its claim solely based on representations to the NIGC,
10 by Downes himself, that suggested otherwise.

11 The Court therefore rejects Defendants' equitable estoppel argument. Because
12 Plaintiff has raised an issue of fact as to whether Downes jointly represented Plaintiff after
13 execution of the Project Agreements, the Court **DENIES** in part Downes's Motion for
14 Summary Judgment on Plaintiff's professional negligence and breach of fiduciary duty claims
15 to the extent that they are based on events after March 29, 2000 and before Downes formed
16 BDR.

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18 D. Negligent Misrepresentation

19 Downes also argues that Plaintiff has failed to present any evidence that he made
20 statements upon which Plaintiff's negligent misrepresentation claim could be based. The
21 Court disagrees. In its Complaint, Plaintiff alleged that all Defendants made
22 misrepresentations "to encourage and induce Plaintiff to continue to pursue its joint venture
23 gaming project." (Compl. ¶ 82.) Specifically, Plaintiff claimed that Defendants made "false
24 statements of material fact, relating to, among other things, the ease and speed with which
25 the Defendants could address and resolve the regulatory and legal hurdles to establishing
26 the joint venture gaming project on Plaintiff's behalf." (Compl. ¶ 83.)

27 As noted above, Downes communicated with Plaintiff often throughout the course of
28 the Project, at times confidentially. Where an attorney-client relationship exists, expressions

1 of professional opinion may be actionable even if they are not factual statements. See Bily
2 v. Arthur Young & Co., 3 Cal. 4th 370, 408 (1992) (“when a party possesses or holds itself
3 out as possessing superior knowledge or special information or expertise regarding the
4 subject matter and a plaintiff is so situated that it may reasonably rely on such supposed
5 knowledge, information, or expertise, the defendant’s representation may be treated as one
6 of material fact.”) The Court finds that because Plaintiff has raised an issue of fact as to
7 whether Downes jointly represented Plaintiff after the Project Agreements were executed and
8 while he was employed at Dorsey, Plaintiff has also raised an issue of fact regarding whether
9 Downes purported to have superior knowledge of the subject matter and whether Plaintiff
10 relied on this knowledge.

11 Because a triable issue of fact exists as to whether Downes jointly represented
12 Plaintiff and the Tribe following execution of the Project Agreements and during his
13 employment with Dorsey, the Court **DENIES** in part Downes’s motion for summary judgment
14 on Plaintiff’s negligent misrepresentation claim, insofar as it is based on events during this
15 time period.

16
17 E. Bledsoe Downes & Rosier’s Representation of Plaintiff

18 BDR argues that because an attorney-client relationship never existed between itself
19 and Plaintiff, summary judgment should be granted in its favor on all three of Plaintiff’s
20 claims. The Court agrees for the following reasons.

21 The Court must again consider the Sky Valley factors to determine whether it would
22 have been reasonable for Plaintiff to believe that BDR jointly represented both it and the
23 Tribe. Downes and his partner Ronald Rosier did not form BDR until January, 2006, several
24 years after the parties executed the initial Project Agreements. (Downes Decl. ¶ 5.) Plaintiff
25 filed the Complaint in this case on December 28, 2006. Plaintiff broadly alleges that Downes
26 continued to act in the same role for Plaintiff at BDR as he had at Dorsey. Plaintiff claims
27 that the manner and method of communication with Downes was the same, the type of legal
28 services Downes performed was the same, and its interaction with Downes was the same.

1 Plaintiff does not offer sufficient evidence, however, to support these assertions.

2 Plaintiff includes in the record several email communications between Oegema and
3 Downes following the formation of BDR. None of these communications suggest that BDR
4 gave legal advice solely for Plaintiff's benefit and not as required for the joint venture.
5 Rather, in these email exchanges, Oegema and Downes appear to disagree on several
6 points, with Oegema representing the interests of Plaintiff and Downes representing the
7 interests of the Tribe. For instance, Oegema promotes the sale of the Walker property while
8 Downes opposes it. (PNOL, Ex. 38 p. 595–596.) Oegema advocates the sale to recoup
9 costs for Celani, but Downes appears concerned that the sale would risk a breach of the
10 contract with Viejas by the Tribe. (*Id.*) Plaintiff could not reasonably believe that these email
11 communications, in which Downes clearly represents the Tribe's interests as opposed to
12 Celani's, established an attorney-client relationship.

13 Plaintiff also cites several confidential memoranda³ circulated by Downes after the
14 formation of BDR as evidence that BDR represented Plaintiff. (PNOL, Ex. 38 p. 573–593.)
15 These memoranda, however, appear to offer legal analysis related only to moving the joint
16 venture with Viejas forward. They do not give legal advice specifically for Plaintiff's benefit.
17 Merely offering legal advice is not sufficient to create an attorney-client relationship where
18 a party claims joint representation. *Sky Valley*, 150 F.R.D. at 651. In light of the significant
19 common interests of Plaintiff and the Tribe, it was not reasonable for Plaintiff, a sophisticated
20 party, to believe that these documents alone established an attorney-client relationship with
21 BDR.

22 Furthermore, unlike the Dorsey payment invoices, the BDR "Statement of Services"
23 does not indicate any work done by Downes solely for Plaintiff's benefit. (*See* PNOL Ex. 38
24 p.602–604.) Rather, the Statement of Services appears to reflect work done only for the
25 Tribe. Although Downes admitted that Plaintiff paid the expenses listed on the Statement of
26

27 ³ Two memoranda appear to have been first electronically transmitted on Dec. 21,
28 2006, and later re-transmitted on Jan. 10, 2007. (*See* PNOL Ex. 38 573–577, 581–585
("Transfer of Viejas Trust Lands for Gaming"), Ex. 38 p. 378–380, 391–393 ("Remaining Fee
to Trust Application Steps & NEPA Issues")). The memoranda appear substantively
identical.

1 Services in accordance with the Project Agreements (Downes Decl. ¶ 7.), the mere payment
2 of attorneys' fees will not necessarily establish an attorney-client relationship. Zenith Ins. Co.
3 V. Cozen O'Connor, 148 Cal. App. 4th 998, 1010 (2007). The Court therefore concludes that
4 no reasonable jury could find that an attorney-client relationship existed between Plaintiff and
5 BDR.

6 Finally, the Court notes that Plaintiff cites no legal authority to support the contention
7 that BDR may be held liable for Downes' actions prior to its formation. All of the negligent
8 conduct Plaintiff complains of took place before BDR came into existence. Plaintiff alleges
9 that all Defendants failed to properly investigate the regulatory approvals necessary to
10 advance the Project and misrepresented the ease which with those approvals could be
11 obtained after the Project Agreement was executed. However, these allegations all concern
12 actions by the other Defendants well before BDR came into existence. As a result, no
13 reasonable jury could find BDR liable based on Plaintiff's professional negligence and breach
14 of fiduciary duty claims. The Court thus **GRANTS** summary judgment in favor of BDR on
15 Plaintiff's professional negligence and breach of fiduciary duty claims.

16 Courts have allowed limited recovery by a third party non-client against an attorney
17 under a negligent misrepresentation theory in cases where the third party alleges
18 misrepresentation of fact rather than legal opinion. B.L.M. v. Sabo & Deitsch, 55 Cal. App.
19 4th 823, 839 (1997). Plaintiff's negligent misrepresentation claim against BDR is based on
20 alleged "false statements of material fact, relating to, among other things, the ease and
21 speed with which the Defendants could address and resolve the regulatory and legal hurdles
22 to establishing the joint venture gaming project on Plaintiff's behalf." (Compl. ¶ 83.) After
23 examining all the evidence presented in the light most favorable to Plaintiff, the Court
24 concludes that no fair-minded jury could find in favor of Plaintiff on its negligent
25 misrepresentation claim against BDR.

26 Plaintiff fails to cite any specific factual statements made by Downes while at BDR in
27 support of its negligent misrepresentation claim. Moreover, BDR was formed almost six
28 years after Plaintiff and the Tribe executed the original Project Agreements, and three years
after they agreed to pursue an alternative project with Viejas. Based on the lack of evidence

1 showing that Plaintiff did, in fact, rely on any factual representations made by Downes, while
2 at BDR, to continue to honor its obligations under the Project Agreements, the Court finds
3 that there is no triable issue of fact on Plaintiff's negligent misrepresentation claim against
4 BDR. The Court therefore **GRANTS** summary judgment in favor of BDR on Plaintiff's
5 negligent misrepresentation claim.

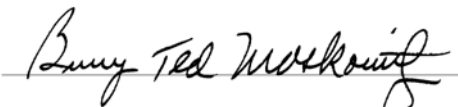
6 Because no liability exists on the part of BDR, likewise no reasonable jury could find
7 Downes himself liable for any actions he took after forming BDR. The Court therefore also
8 **GRANTS** partial summary judgment in favor of Downes on all three of Plaintiff's claims, to
9 the extent that they are based on events after BDR came into existence.

10 11 **III. CONCLUSION**

12 For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART**
13 Defendants Bradley Grant Bledsoe Downes and Bledsoe Downes & Rosier's Motion for
14 Summary Judgment [Doc. 76]. The Clerk shall enter judgment for Downes against Plaintiff
15 on the first, second, and third causes of action insofar as they allege acts of professional
16 negligence, negligent misrepresentation, and breach of fiduciary duty taking place before
17 March 29, 2000, when the parties executed the Project Agreements, and after the formation
18 of BDR in January, 2006. The Defendants' Motion for Summary Judgment on the first,
19 second, and third causes of action as they otherwise apply to Downes is **DENIED** without
20 prejudice. The Clerk shall enter judgment for BDR on the first, second, and third causes of
21 action in their entirety.

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23 **IT IS SO ORDERED.**

24 DATED: March 6, 2009

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26 Honorable Barry Ted Moskowitz
27 United States District Judge
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